Non-regression clauses: sufficient to maintain the UK-EU future relationship on environmental standards and regulation?

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1. Introduction

Both the UK and the EU have called for non-regression of environmental standards and regulation in their future relationship. [2] As environmental regulation imposes costs, there is an incentive for governments to give their industries a competitive advantage through deregulation. The EU has tried to prevent this problem in existing trade agreements by including a requirement for non-regression of environmental standards. The draft Withdrawal Agreement of November 2018 also includes requirements for non-regression of environmental standards that would apply, as part of the so-called backstop, if a future relationship agreement were not concluded by the end of the transition period.[3] Even if (and when) the backstop is superseded by the future relationship, the UK and the EU have indicated that this relationship will build on these commitments.[4]

In this note I first describe why this 'environmental backstop' is an innovative hybrid between the full alignment with environmental legislation required in EU Association Agreements and the EEA Agreement, and the arm's length non-regression requirements that the EU has negotiated in its trade agreements with countries such as Canada and Korea. It also has some unique features. Notably, successful implementation would require substantial reform in UK environmental monitoring and enforcement. I thus examine how it might function in practice, focusing in particular on challenges with enforcement. Finally, I analyse its applicability to different models for the future relationship. The Withdrawal Agreement links environmental non-regression to a specific UK-EU customs union. However, if the UK and EU go beyond this, pursuing deep regulatory alignment, it will also prove a source of fundamental disagreement. The UK's current position is to push for non-regression to stand in for regulatory alignment, whilst the EU will likely reject such an approach.

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[2] Michel Barnier, 'Is Brexit a threat to the future of the EU's environment', 10 April 2018. Available at http://europa.eu/rapid/press-release_SPEECH-18-3162_en.htm HM Government, Framework for the UK-EU Partnership: Open and fair competition, 25 July 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/734935/2018-08-17_F_O_Competition_Slides_FINAL.pdf (accessed 12 December 2018)

[3] Protocol on Ireland/Northern Ireland, Article 6(1), and Annex 4, available at: https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf

[4] HM Government, Draft Political Declaration setting out the framework for the future relationship between the EU and UK, 22 November 2018, Article XIV para 79. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/758557/22_November_Draft_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_EU_and_the_UK__agreed_at_negotiators__level_and_agreed_in_principle_at_political_level__subject_to_endorsement_by_Leaders.pdf (accessed 12 December 2018)

II: Innovative environmental governance between the EU and UK

With respect to environmental regulation, the UK-EU relationship is unique. It is most likely that their future relationship will diverge from existing regulatory alignment, rather than attempting to increase it, the objective of most trade agreements. Yet the UK aims to transpose existing EU regulation. This shared starting point, combined with the current degree of trade integration, means that derogations will be watched more closely and felt more keenly.

The environmental backstop reflects this unique situation through innovative elements. It provides a hybrid between 'shallow' (standard EU FTA) approaches to environmental non-regression and 'deep' (EEA or Association Agreement) alignment with environmental regulation. In the former, the EU has attempted to secure an environmental 'level playing field' through non-regression clauses in Trade and Sustainable Development (TSD) chapters. Broadly speaking, these prohibit the weakening, or poor enforcement, of existing environmental laws in order to benefit trade or investment. Such non-regression clauses have limited aspirations, as they are included in FTAs with countries with whom the EU has little or no existing bilateral environmental cooperation or legislative alignment. Marx, et al., argue that 'the main added value of TSD chapters may … not lie in the 'harmonisation' of social and environmental standards between the partners, but rather in fostering dialogue and cooperation to achieve sustainable trade in the long run.'[5]

In contrast, in its European Neighbourhood Policy, the EU has required partner countries to align gradually with a broad array of EU environmental legislation. The Ukraine Association Agreement, for example, requires Ukraine to adopt EU environmental regulation covering air quality, climate change and environmental impact assessment, among others.[6] Whilst such agreements also contain broad non-regression requirements, these are superseded by substantive alignment, which takes place in the context of overall harmonisation with EU legislation.

i) Innovative element: breadth

EU environmental non-regression requirements base shared commitment to environmental protection on economic motivations. The Commission makes this explicit in its presentation on the Level Playing Field with the UK, which concludes that continued UK derogation from the Industrial Emissions Directive 'best available technologies' requirement, or reduced UK ambition in national emissions ceiling standards, could provide UK industry a 4.7 billion euro/year gain.[7]

Clearly not all environmental regulation is equally likely to provide competitive advantages. For this reason, in existing EU TSD chapters, the requirement not to lower environmental standards is qualified by a causal link with trade and investment. As an

[5] Axel Marx, et al. (2016), 'Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements', Leuven Centre for Global Governance Studies, at 15.
[6] https://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155103.pdf
[7] European Commission, 'Slides on a Level Playing Field,' p. 37. Available at https://ec.europa.eu/commission/sites/beta-political/files/level_playing_field.pdf (accessed 12 December 2018).

illustrative example, the EU-Korea FTA states that Parties shall not 'weaken or reduce environmental…protections…to encourage trade and investment….'[8] In contrast, in the environmental backstop the requirement not to regress is absolute: there is no need to establish an effect on trade. Parties commit to non-regression of the level of protection provided by 'common standards' in listed areas. The list covers the most relevant areas of the EU environmental *acquis* and is nearly comprehensive in scope; though excluding purely local issues such as noise pollution and bathing water quality. It includes 'laws, regulations and practices', encompassing not only formal regulation but also its implementation. The comprehensiveness of the coverage makes plain that, due to the connectedness between the UK and the EU, the EU views UK competitive environmental deregulation as a particularly pressing concern. In including 'nature conservation and biodiversity' on the list, it surpasses all other EU trade agreements, even the EEA Agreement, in thematic coverage.[9](Though it should be underlined that, in covered areas, the EEA Agreement requires EU regulatory alignment, whilst the environmental backstop only requires that the same level of protection be achieved.)

However, the agreement also makes targeted commitments in areas that the Commission identified as posing a particular threat to the level playing field. Parties will negotiate emissions limits in three areas: certain atmospheric pollutants, sulphur content of marine fuels and industrial emissions; underscoring the concerns highlighted in the Commission's presentation, the latter also includes a commitment to 'best available practices'.

As an environmental non-regression requirement, this is unique. It contrasts with the Association Agreement model of requiring the UK to substantively align with EU environmental legislation, though in a narrower scope of thematic areas. It also departs from existing FTA non-regression requirements, which remain thematically open-ended, but rely upon a causal link between environmental protection and trade and investment.

ii) Innovative element: Enforcement

The non-regression commitments above, outlined in Article 2, are exempted from arbitration under the dispute settlement mechanism of the Protocol. This means that there can be no sanctions for non-compliance. However, the monitoring and enforcement commitments of Article 3 *are* enforceable. They are also unilateral, applying only to the UK, and not the EU. Noting that the EU has the Commission and the Court of Justice to uphold the 'common standards' identified above, Article 3 of the environmental backstop commits the UK to ensure 'effective enforcement of…its laws, regulations and practices'. This includes enabling administrative and judicial proceedings by public authorities and members of the public. It also commits the UK to providing for effective remedies including sanctions that '…are effective, proportionate and dissuasive and have a real and

[8] Article 13.7, EU-Korea FTA. It should be noted that some TSD chapters include unqualified commitments to high levels of environmental protection in the form of aspirational best endeavours clauses; eg, in the EU-Canada Comprehensive Economic and Trade Agreement ('CETA'), Parties '…shall seek to ensure [their] laws and policies provide for and encourage high levels of environmental protection and shall strive to continue to improve such laws and policies and their underlying levels of protection (Article 24.3).

[9] The EEA Agreement excludes the Habitats and Birds Directive.

deterrent effect'. It states that this UK body should be able to initiate inquiries of breach by the government, and bring legal action with a view toward an 'adequate remedy'.

Again, this contrasts with existing models. TSD chapters emphasize domestic enforcement as the primary means to uphold non-regression requirements. For example, EU-Korea Article 13.7(1) requires that 'A Party shall not fail to effectively enforce its environmental … laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties.'

However, the EU excludes TSD chapters from state-to-state dispute mechanisms, enforcing them instead through a panel of experts which can make non-binding recommendations.[10] Commitments to uphold labour and environmental standards function through the FTA's establishment of monitoring bodies and committees of government officials, civil society, business and trade union representatives. For these reasons, such commitments to environmental protection are often described as soft or cooperative.[11]

III) Implementation and enforcement

i) Establishing 'level of protection

The innovative nature of the environmental backstop makes its implementation and enforcement somewhat unpredictable. Environmental regulation is a dynamic area, and in the absence of ongoing harmonisation it is possible that divergence would take place; indeed, in the UK, the very act of leaving the EU necessitates a degree of domestic regulatory reform, an issue discussed further below. Thus establishing whether 'common standards' have been breached may prove challenging, particularly over time. Article 2 specifies that these are the common standards at the end of the transition period, which fixes them to existing EU legislation. Yet in the future, determining that the UK and EU are achieving the same 'level of protection' would require establishing that diverging environmental regulation is equivalent. Presumably there will be communication to establish this in the Joint Committee that implements the Agreement, and between EU and UK environmental regulators. While ongoing communication would not aim at harmonisation, it might make harmonisation more likely, partly in order to avoid potential conflict.

As stated above, the non-regression requirement is exempted from direct dispute settlement via arbitral tribunal; disputes must be settled via the Joint Committee. However, the EU can pursue a perceived derogation from common standards under Article 2 as a failure of UK monitoring and enforcement under Article 3. Article 3(1) states that the benchmark for UK effective enforcement is its ability to uphold the common standards referred to in Article 2(1). Thus, while a substantive failure to uphold level of protection can prompt a dispute, its outcome is determined on procedural

[10] European Commission non-paper, 2017, 'Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs)', http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf (visited 12 December 2018); James Harrison, et al., (2018) 'Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters', Journal of Common Market Studies pp. 1-18; Marx, et al., above n. 5, pp. 1-102.

[11] European Commission non-paper, ibid.

grounds, through assessing whether the UK has met the requirements for monitoring and enforcement.

To some extent, this shows a clear-eyed view of the limitations of an arbitral tribunal. Much EU environmental regulation is complex and process-oriented, focusing on ecosystem or life-cycle management, and including public participation requirements and economic instruments. This gives rise to questions that would strain the expertise of an arbitral tribunal: is level of protection outcome-based, or does it encompass procedural requirements? If the UK adopted different regulatory strategies – moving from emissions limits to tradeable permits, or giving manufacturers greater scope to self-certify that they had met emissions limits – would the EU be able to argue that this constituted a lower level of protection? What if the UK decides to 'cut red tape' and reduce costs by reducing the requirements for monitoring and the frequency of public consultation? As I have argued in the context of WTO dispute settlement,[12] environmental problems pose challenges for trade tribunals precisely because their causes – and results – are often diffuse and scientifically complex. This would complicate evidence-based approaches to establish 'equivalence' between approaches.

A further, though less fatal, problem is the discrepancy between level of protection in law and in practice. The Commission's Environmental Implementation Review makes clear that many Member States fall short. Thus assessing derogation from non-regression requirement risks imposing stricter standards on the UK than existing EU Member States. To avoid this, enforcement of a non-regression clause would need to rest upon EU levels of protection in practice. But if the UK were only compared to the EU's worst actors, or its own level of protection at the time it leaves the EU, this lessens the rigour of the requirement. The existing structure avoids these problems by calling for the UK to establish a domestic system of administrative enforcement and judicial review that is equivalent to that imposed in the EU.

These practical problems with assessing level of protection suggest that enforcing a broad non-regression requirement is effectively impossible. Yet the requirements to negotiate specific quantitative standards for industrial emissions and pollution avoids these problems, and the rationale for exemption is less clear.

ii) Unilateral enforcement

Meeting the environmental backstop's monitoring and enforcement requirements outlined in Article 3 will necessitate significant domestic reform in the UK. The environment is a closely-integrated EU policy area, and the UK government has stated that it will be unable to transpose a third of EU environmental regulation due to inability to replicate the functions of EU bodies and agencies.[13] Even when the UK successfully transposes EU regulation, it will not be the same. Many environmental Directives provide significant flexibilities for Member States' implementation, and rely upon ongoing reporting and

[12] See, eg, E Lydgate (2013) 'The EU, the WTO and indirect land use change' 47(1) Journal of World Trade,159-186; E Lydgate (2012) Biofuels, sustainability and trade-related regulatory chill 15(1) JIEL 157-180; E Lydgate, 'Is it rational and consistent? The WTO's surprising role in shaping domestic public policy, 21(2) JIEL, 1-22.

[13] Environmental Audit Committee, 'The Future of the Natural Environment After the EU Referendum', Sixth Report of the Session, 14 December 2016, p. 18.
https://publications.parliament.uk/pa/cm201617/cmselect/cmenvaud/599/599.pdf

evaluation from the Commission. The UK must replicate the EU's monitoring functions.[14]

With respect to judicial enforcement, environmental infringement cases are the most likely of any category to end up before the CJEU, and the UK has lost the majority of these cases.[15] In the absence of the CJEU, Article 3 requires the UK to establish an environmental body that can bring legal action for an 'adequate remedy'. At the time of writing (before the publication of the UK Environmental Principles and Governance Bill) this arguably goes beyond its stated commitment.[16] Article 3 also commits the UK to enabling administrative and judicial proceedings by members of the public. The Aarhus Convention Compliance Committee has raised concerns regarding the UK's high threshold for initiating judicial review of environmental decisions of public bodies, which allows scrutiny only on procedural grounds, rather than examination of the substantive legality of these decisions.[17] The environmental backstop commits Parties to implement effectively the multilateral environmental agreements to which they are party. This includes the Aarhus Convention, some of whose requirements for rights of access to information, public participation and access to justice for environmental matters are replicated in Article 3 of the environmental backstop. However, listing compliance with the Aarhus Convention, including recommendations of its Compliance Committee, would have provided another yardstick to measure the effectiveness of UK environmental enforcement.

In sum, to uphold common standards, the UK must not just replicate lost EU bodies and institutions – it must better its current practice. The backstop provides the EU a means of scrutiny. In this sense, it is ambitious.

Despite its broad scope, it still seems most likely that the EU would utilise this enforcement mechanism only if its competitive interests were clearly at stake. That is to say, deregulation concerns about industrial emissions and pollution that motivated these provisions are also most likely to prompt a contentious dispute. In this sense, it is unlikely to function as a broad environmental protection instrument. Its enforcement in practice will likely implicitly incorporate a 'causal link' between lowering protection and benefitting trade and investment.

Yet avoiding the requirement to establish this causal link explicitly makes better environmental protection outcomes more likely. While determining 'level of protection' would likely prove challenging for an arbitral tribunal, establishing causal link is similarly challenging.. A recent dispute under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) illustrates the point. In the dispute, the US argued that Guatemala had failed to enforce its own labour laws by, *inter alia*, preventing workers from forming unions, resulting in a competitive advantage over US workers. The Tribunal failed to establish that the weakening took place 'in a manner

[14] For a useful discussion of this topic, see: R Hogarth, A Stojanovic, J Rutter, 'Supervision after Brexit: Oversight of the UK's future relationship with the EU', Institute for Government, November 2018.
[15] Hogarth R and Lloyd L, Who's Afraid of the ECJ? Institute for Government, 2017, www.instituteforgovernment.
org.uk/publications/whos-afraid-ecj-brexit
[16] See Fiona Harvey, 'Lawyers say Gove proposals for Brexit environmental watchdog are useless', Guardian, 7 August 2018, available at: https://www.theguardian.com/environment/2018/aug/07/lawyers-say-gove-proposals-for-brexit-environmental-watchdog-are-useless
[17] Aarhus Convention Compliance Committee, Communication ACCC/C/2008/C33

affecting trade', arguing that 'attempting to establish that an effect on prices is due to a failure to enforce and not to … other factors would often be so fraught with difficulty as to make proof of trade effects impossible.'[18] Further, it argued, it is impossible to establish that companies respond to such effects by lowering their prices. There is scope to soften the approach. Notably, more emphasis could be placed on the *intent* of the lowering of protection, rather than requiring that a competitive effect be evidenced, which may be (as the tribunal noted) virtually impossible. However, establishing discriminatory intent is not necessarily any more straightforward, as there may not be clear evidence; evaluating intent has long proved a source of controversy, for example, for the WTO.[19]

Thus establishing causal link may be so difficult that even established derogation does not meet with any consequence. Alternatively, the environmental backstop could have stipulated that, due to the geographic proximity and economic connectedness of the UK and EU, any derogation would automatically constitute a benefit to trade and investment. Given the wide scope of coverage, this would far exceed the concerns regarding competitive deregulation that motivated the environmental backstop. The current approach avoids these pitfalls.

A final point is that there could be significant divergence in environmental regulation *between* countries within the UK. In Wales, Scotland and Northern Ireland, environmental protection is a devolved competence. This could lead to difficulties in enforcing Article 3, if for example Scotland decided to continue aligning its regulation with that of the EU whilst England diverged.

IV. Environmental non-regression in the UK-EU future relationship

i) In a Customs Union or Free Trade Area

The level playing field requirements, including the environmental backstop, were introduced in conjunction with the UK-EU Customs Union (more precisely, the 'arrangements for a single customs territory comprising the EU, Northern Ireland and Great Britain'), to ensure its 'proper functioning'.[20] However, it would be a mistake to view them simply as offsetting the competitive threats resulting from the relatively high level of market access that a customs union would preserve.[21] In fact, the environmental backstop will likely comprise an EU baseline even in the absence of a customs union. EU Member States' desire to introduce LPF guarantees is motivated by divergence from the regulatory *status quo*. As Chief EU Negotiator Michel Barnier has stated:

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[18] Dominical Republic – Central America – United States of America, *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, Final Report of the Panel, circulated June 14 2017, pp 58-60.

[19] For a discussion of intent versus effect in WTO non-discrimination case law, see: E Lydgate (2016), Sorting out Mixed Messages under the WTO national treatment principle: a proposed approach, World Trade Review pp 1-28.

[20] Above n. 3, Article XIV, para. 79.

[21] This market access would result from removing the need for border checks verifying the origin of goods; regulatory border checks would still take place and regulatory divergence between the UK and EU would be permitted, though Northern Ireland would maintain broad regulatory alignment with the EU.

> *The mechanics of divergence should not lead to unfair competition, because if we do not answer this question… It will be said that Brussels is conducting negotiations with the UK to downgrade environmental and social standards…. If that happens, everything is over.*[22]

The political declaration on the future relationship also affirms that it will '…[build] on the level playing field arrangements provided for in the Withdrawal Agreement ….'[23]

As compared to a customs union, an FTA would provide the UK with greater scope for independent trade policy. Normally non-regression requirements do not impose restrictions on traded products. However the breadth of the requirement encompasses some product-related regulation. The most direct clash would result from its non-regression requirement for common standards for 'the prevention, reduction and elimination of risks to human health or the environment arising from the production, use, release and disposal of chemical substances'. This corresponds thematically with EU REACH regulation, which applies to a wide range of products and sectors.

The EU could interpret this requirement as limiting the UK's ability to align with differing third party regulation, such as that of the US, in areas affected by REACH. However the point is largely academic. The UK has consistently expressed an interest in maintaining alignment with the EU in highly-regulated sectors, a point discussed further below. Also, the EU regulates the import of goods from third countries to ensure compliance with its own standards, which include those related to production process.

ii) In a deep regulatory alignment (Single Market) model

The environmental backstop likely comprises a minimum standard for a future FTA. Unless its position evolves, the UK government will argue that non-regression requirements should also feature in a future agreement that involves deep regulatory alignment, in place of alignment with the EU environmental *acquis*. This is likely to comprise a significant axis of disagreement. In their future relationship, the UK has proposed that its trade with the EU be governed by a common rule-book[24] for product-related regulation 'necessary to provide for frictionless trade at the border', but that non-product-related regulation should not be harmonised. Instead the UK proposes a non-regression requirement to maintain high environmental standards.[25] The UK's proposal, likely shaped by the imperative of maintaining an open intra-Irish border, provides an instrumentalist understanding of regulatory integration as concerning the removal of border barriers.

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[22] Michel Barnier, Corrected Oral Evidence: Scrutiny of Brexit negotiations, House of Lords EU Committee, Q8, 12 July 2017, response to Q 8, available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/scrutiny-of-brexit-negotiations/oral/69285.html (accessed 12 Decembe 2018).

[23] Above n. 4 at Article XIV, para 79.

[24] Its common rule-book will cover manufactured goods and agri-foods, but only applies to regulations 'necessary to provide for frictionless trade at the border'. With respect to agri-food, the UK states that, alongside the 'common rule book' in animal and plant health (Sanitary and Phytosanitary 'SPS') regulation, it wants to maintain 'equivalence' (rather than harmonisation) on 'wider food policy rules'. Areas for 'equivalence' include marketing and labelling requirements (Section 1.2.4). Areas for divergence include the Common Agricultural Policy and Common Fisheries Policy.

[25] The White Paper states that the UK will commit to 'high regulatory **environmental** standards through a non-regression requirement'

With respect to intra-EU environmental law, the distinction between product-related and non-product related environmental regulation has some salience. Many environmental Directives that focus on national environmental protection – for example, water and air quality, species protection, waste disposal – proscribe a minimum level of protection. This serves to prevent competitive advantages between EU Member States. The concept of minimum level of environmental protection has been codified as an EU principle in Article 193 TFEU:

> *The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They should be notified to the Commission.*

On the other hand, EU Directives tend to impose total harmonisation, that is, a uniform rule from which derogation is impermissible, when there is greater potential of infringing upon the functioning of the internal market, such as regulatory standards for products where differences between Member States could create barriers to free movement of goods. Member States can justify such restrictions under Article 36 TFEU. Once these requirements are harmonised under an EU directive, such derogation is no longer permitted. [26]

In some respects, this mirrors the UK's proposed distinction between rigid harmonisation with respect to product-related regulation and minimum levels of protection for domestic environmental regulation. Yet the parallel is limited, and it is extremely unlikely that the EU would support such an approach. Within the EU, Member States can only derogate upward, and in the context of a commitment to implementing the specific aims of the legislation, as well as broad, and increasing, harmonisation of environmental regulation. The UK's proposal for non-regression, on the other hand, aims to substitute harmonisation with a simpler and more basic commitment. There is no reason to believe that the EU would enable derogation in environmental regulation and suspend EU monitoring and enforcement whilst the UK achieved frictionless market access for its product-related regulation. Nor would it be straightforward to draw a line between the two. [27]

Conclusion

In its uniqueness, the environmental backstop poses a challenge to the EU's characterisation of the UK's options for the EU-UK trade relationship as bi-modal: either EEA-style (full) or Canada-style (shallow) regulatory integration.[28] Instead, it

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[26] Jan H. Jans, Hans H.B. Vedder, Harmonization, in 'European Environmental Law', (Groningen: Europa Law Publishers, 2012), p. 99.

[27] A number of cases in EU law concern precisely the boundary between environmental and product-related regulation, notably whether Member States are permitted to impose restrictions on free movement in service of environmental objectives that go beyond minimum standards imposed in EU Directives. In this context, the ECJ determined that all waste is to be regarded as goods. This in itself would make it difficult to ring-fence product regulation. See L Kramer (2008), Environmental judgments by the Court of Justice and their duration', Research papers in law, No 4/2008.

[28] Slide presented by Michel Barnier, 19 December 2017. Available at: https://ec.europa.eu/commission/sites/beta-political/files/slide_presented_by_barnier_at_euco_15-12-2017.pdf

demonstrates that the EU and UK are willing to negotiate new arrangements that accommodate their conflicting ‘red lines’. This suggests that the future relationship could result in real innovation.

Whilst this innovation resolves conflicting positions, it also entrenches compromise. For environmental advocates, the environmental backstop will prove disappointing in that, in practice, there are only a limited range of circumstances in which the EU would likely hold the UK to account for environmental lapses. Yet, in its enforcement powers and the fact that it does not require establishing a causal link to trade and investment, it improves upon existing EU FTAs.

Advocates of a more distant relationship will be infuriated that the EU can unilaterally scrutinise whether UK monitoring and enforcement lives up to ‘common standards’, particularly if (and, as I argue, when) such requirements are incorporated into their future relationship. In the end, no amount of clever drafting can bridge the divide between those in the UK who argue for the benefits of EU environmental regulation, monitoring and enforcement, and those who are eager to cast it off. Whilst the environmental backstop calibrates well between these two positions, the challenge facing the UK is that such compromises seem to please no one.